84-174

NO. _____

SUPREME COURT OF THE UNITED STATES
October, 1984

IRA HILL, JR.,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

JOHN D. O'BRIEN, ESQ.
Post Office Box 1218
Panama City, FL 32402
(904) 769-3493
ATTORNEY FOR PETITIONER

121 PP

QUESTION PRESENTED FOR REVIEW

Was the Petitioner denied due process as guaranteed under the Fourteenth Amendment for refusal of the trial judge to give a requested instruction on the Petitioner's theory of defense where there was evidence to support the request.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals Case No. 82-3205 is reported in 730 F.2d 683 (11th Cir. 1984), and appears at Appendix 1. This opinion affirmed the conviction of the petitioner in the trial court.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Eleventh Circuit Court of Appeals was entered on April 23, 1984. The date of the order denying the petitioner's petition for rehearing and suggestion for rehearing was filed May 30, 1984. This petition for a writ of certiorari was filed less than 60 days from that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Ira Hill, Jr., was convicted in Case Number 82-00208, in the United States District Court for the Northern District of Florida, Panama City Division. Hill was charged in a twelve count indictment containing one count of conspiracy to secure certain loans to be guaranteed by an agency of the Federal Government through the use of false statements, and eleven substantive counts of making false statements, personally or through a co-conspirator, contrary to 18 U.S.C. §1001.

The trial was held from September 27, 1982, to October 6, 1982. Hill was convicted of nine counts, including the conspiracy count. On December 17, 1982, Hill was sentenced to five years and a $5,000.00 fine on Count VI and five

years probation and a $3,000.00 fine on each of the remaining counts.

There were admittedly incorrect statements in the various loan documents. The issue was whether the incorrect statements were willfully made. In the lower court Hill's defense was that he relied on his Certified Public Accountant (CPA), Nick Mason, to properly prepare all forms. Mason was an expert not only in accounting but also in the preparation and filing of governmental loan guarantee applications.

Hill requested an instruction in the lower court on good faith reliance on expert which was denied. Hill appealed the denial of the requested jury instruction to the Eleventh Circuit who affirmed the conviction (United

States v. Johnson, et al, 730 F.2d 683 (11th Cir. 1984) (Appendix 1) and denied a Petition for Rehearing May 30, 1984 (Appendix 2).

The charges against Petitioner, Ira Hill, Jr., resulted from four different transactions. One application for a loan with Hill as the borrower resulted in Counts VI, VII and VIII. An application by Co-Defendant Robert Allen Johnson to buy Florida Trailer Sales from I & E Properties, Inc., (hereinafter "I & E"), a corporation owned by Hill, resulted in Counts II, III, IV and V. An application to buy Eastgate Mobile Home Park (hereinafter "Eastgate") by Pamela Wells, alleged in the indictment to be an unindicted co-conspirator, resulted in Counts IX, X and XI. An application by Joe Dassinger to buy Big Chief Truck Stop (hereinafter "Big

Chief") from I & E resulted in Count XII. A brief summary of the factual background from which the charges arose follows:

The Defendant, Ira Hill, Jr., owned a certain corporation named I & E (8T, 148). I & E conducted various businesses under trade names including a mobile home sales and service lot known as Florida Trailer Sales, a truck stop and restaurant known as Big Chief and a mobile home park known as Eastgate.

In 1978 Hill was convicted of income tax evasion (8T 3). Hill had originally hired Nick Mason, a CPA who would ultimately become the government's chief witness against Hill, to assist him in the preparation of his defense to tax evasion charges. Mason after the trial, worked full time with Hill as the

comptroller of several of Hill's businesses and as a CPA in general charge of all Hill's financial books and records, including checking accounts (8T4; 3T97-98, 107, 111; 7T4-8; 8T36-37; 3T 86,4). Mason, unknown to Hill at that time, was an unmitigated liar. Neither Mason's former clients nor former partners would believe him under oath (15T 174-176; 72-73; 184). In fact Mason had left his former firm on an April 15, when the other partners discovered an "office full of hostile clients" to whom Mason had lied concerning extensions of time to file tax returns (15T 188-189). Ironically, Mason would leave Hill's employ eight or nine months after the events resulting in these charges (but prior to the discovery of the errors), at tax time when Mason lied to Hill and Hill's wife as to the filing of returns

for Hill's businesses. Hill at that time was on probation for tax evasion.

Hill's tax evasion conviction caused him to have psychological difficulties which interfered with his ability to properly attend to his businesses (8T 6). As a result, Hill resolved to sell his various businesses to an employee and hold the purchase money mortgage himself (8T 6). Mason, however, advised a different course of action. Since Hill owed his father money, what Hill should do, according to Mason, was transfer the master corporation (I & E) to his father and buy back Florida Trailer Sales, one of the businesses that made the most money, with an SBA guaranteed loan. Mason said he had discussed the matter with the SBA and the procedure would be alright with them

(8T 38-40, 107-108, 145, 146).

Hill conveyed the shares to his father (8T 40, 69) and Mason prepared all the papers for a governmentally guaranteed loan from the Wewahitchka State Bank (3T, 6, 23-26). The loan was not made but the application resulted in three counts against Hill. Count VII charging as a false statement Hill's representation in the application that he did not own Florida Trailer Sales; Count VIII charging that Hill filed a false financial statement in connection with the application for the loan in that the I & E assets were not shown, and Count VI charging that Hill filed a false statement of personal history in that he did not divulge that he had been convicted of a crime (tax evasion).

Count VI was the count on which Hill was sentenced to a prison term and

substantially all of Hill's efforts in the Eleventh Circuit were devoted to reversal of Count VI. The basis of the count was a government form 912 which had a box to check to indicate a previous conviction. Mason, in spite of his absolute knowledge of Hill's previous conviction (having attended both the trial and the sentencing), checked a box indicating no previous conviction.

The papers comprising the application were voluminous. Hill testified that he signed them all, including the 912 form, without reading it, relying on Mason. There would have been no motive for Hill to lie about a conviction in any event since the application was not made to SBA but to the Wewahitchka State Bank, the bank with which Hill had done business for years (T23). The Bank was

the applicant for the loan guarantee (12T, 40, 72, 73) and the Bank personel were well acquainted with Hill's conviction (18T 35; 16T 12; 9T 27; 12T 811) The president of the Bank appeared at the tax trial to testify as a character witness and the Chairman of the Board, major stockholders and other officers from the bank wrote letters to the Judge asking for clemency in sentencing (8T 34) 15).

The bank president, Lister, said he didn't notice the incorrect statements and was charged as a part of the conspiracy. The loan committee and the Board of Directors, who also reviewed the documents, evidently didn't notice the incorrect statements either but they weren't charged.

Subsequent to the rejection of the loan application, I & E acting through

Hill entered into contracts for the sale of Florida Trailer Sales, Eastgate and Big Chief. The buyers were either co-defendants or unindicted co-conspirators, Robert Allen Johnson, Pamela Wells and Joe Dassinger. Each of these persons made application to the Wewahitchka State Bank for a loan, and the bank, in turn, made application to the governmental agencies for a loan guarantee Mason prepared all documents for these applications. The loans were made, and the balance of the counts of the indictment were addressed to the statements made by the various persons in making the applications, attributable to Hill through the conspiracy count. The nature of the counts were as follows:

a) On the sale of Florida Trailer Sales to Johnson, Count II charged that

Johnson had filed a false statement of personal history in that it did not divulge that Johnson had been convicted of a crime. Count III charged as a false statement a representation that a $50,000 down payment had been made. (All defendants were acquitted on this count.) Count IV charged that Johnson filed a false financial statement as a part of the loan application (Hill was acquitted on this count) and Count V charged as a false statement a representation that an additional $10,000 payment had been made on the sale of Florida Trailer Sales.

b) On Eastgate, Count IX charged that Hill filed a false financial statement (as a part of a guarantee by Hill in which he listed the assets of I & E). Count X charged that the buyer did not make a down payment as stated by "the

defendants" and Count XI charged that the buyer, Pam Wells, filed a false financial statement (Hill was acquitted of this Count).

c) On Big Chief, Count XII charged as a false statement a representation that a $10,000 down payment had been made.

At trial the issues were clearly presented in two distinct versions. The government relied on Mason's testimony that the incorrect statements were deliberate lies. The defendants attacked Mason's credibility showing that Mason was an unconscionable liar, and put on evidence to show Mason's motive to lie in the particular case[1]. The entire

1. Mason's motive to lie concerned Mason's wife and the bank president, Lister, which resulted in Mason's divorce. At time of trial Lister was married to Mason's ex-wife. Mason had

From opening statement to closing arguments Hill's defense was good faith reliance on Mason, as can be conclusively demonstrated by the testimony of Hill.

> Q. Did you rely on Nick Mason during the process of these government loans?
>
> A. Completely. I had no knowledge of how to fill out a government loan at all. I had never seen one.
>
> (8T, 34)
>
> Q. All right. Do you have any particular recollection of signing that 912 form?
>
> A. I don't recall ever seeing it. I am sure that if it was passed in front of me, the papers, that I signed it. The first time that I ever actually read it was when this trial started. I didn't know

said he would get even. balance of defendant's evidence was addressed to good faith reliance.

what a 912 was until everybody started talking about it. But I certainly didn't sign it with the intent to defraud the federal government or the Wewahitchika State Bank. Because they knew it.

(8T, 36)

Q. Can you explain to the jury how it could be that the 912 form was signed and in the fashion that it was?

A. Well Mr. Mason had my authority to fill out all the papers on the SBA. He had all my books, all my financial records at his office. And he was handling the SBA loan for me. And when it was all filled out I signed all the papers necessary. I did not read the papers. I didn't see no need to read it. He had my records and it was -- it was open for him or the government to look at it at any time. And --

(8T, 36)

On cross-examination:

Q. Mr. Hill, you testified that you just signed all of those documents, your personal history form and your contracts, things like that without reading them, is that

true?

A. That's true. Yes, sir.

Q. You just relied on your alcoholic CPA?

A. I relied on Nick Mason, yes, sir.

(8T, 103)

Q. It was Nick Mason that got you into all of this trouble?

A. He filled out all of the papers. He had the authority from me to do so and I signed the papers. I had no reason at that time to believe that he was making anything out wrong.

Q. Did you have any reason to read business papers -- did you have any reason to read the business papers you were signing, sir?

A. I had an opportunity if I wanted to read them. But I didn't read them.

Q. How long have you been in business?

A. I have been in the mobile home business, at that time about 10 or 9 years.

Q. How long have you been dealing with banks getting business loans?

A. About 8 years, since I was in the mobile home business.

Q. You made -- you were a millionaire, weren't you?

A. Right, in property.

Q. Did you make that money signing papers that you didn't read?

A. I have signed many a paper at the bank that I never read. I have never read a contract at any bank or note that I have signed, even at real estate offices. May be that's wrong. But, if you read it all, you would be there all day. I am sorry, I just didn't read it.

(8T, 103-104)

Q. All right. Mr. Hill, is it just an accident that your signature is -- has ended up on so many lies that were sent to the government?

A. I signed papers that were presented to me by Mr. Mason who said he was an expert in SBA and Farmers Home loans and I had confidence in that he

> did know it because I certainly did not know how to fill out this and give those papers and I did not read all of this. But I did sign some.

The lines were so clearly drawn in fact that the prosecutor argued to the jury that there were only two versions:

> Ladies and Gentlemen, it really all boils down to essentially two stories. One of them is that . . . Nick Mason had led all of these people astray . . . the other story, ladies and gentlemen, is that these gentlemen . . . told whatever lies were necessary. . . (17T 103).

Since the trial did consist of essentially two stories, at the charge conference Hill requested a jury charge on reliance, which was his defense. Hill requested:

> You are charged that it is a complete defense to the charge against the Defendant, IRA HILL, JR., that he relied in good faith and after full disclosure on expert advice. United States v. Smith, 523 F.2d 771 (5th Cir. 1975) cert.

> denied 97 S.Ct. 59, rehearing denied, 97 S.Ct. 509; United States v. Miller, 658 F.2d 235 (4th Cir. 1981).

The court had his secretary retype the instruction (the wording of which was acceptable to Hill), to read as follows:

> It is a defense that the defendant signed the forms in reliance on expert advise [sic]. The reliance defense, to be effective, must establish good faith reliance on an expert coupled with full disclosure to that expert (16T, 80).

The court nevertheless denied the requested instruction. Thus, even though there were only "essentially two stories" the jury was not told that the defendant's "story" was important as a defense.[2]

2. No instruction was given addressed to the point other than a definition of willfulness. The entire charge to the jury is set out in Appendix 4.

The district judge's reasoning in deying the instruction is set out fully in the order denying a motion for new trial (appendix 3). The court either forgot the testimony or impermissibly weighed the testimony to conclude that there was no factual basis for the requested charge.

Hill appealed to the Eleventh Circuit. The entire brief was devoted to showing the factual basis for the requested instruction. The Eleventh Circuit affirmed, finding a lack of advice:

> Hill and Johnson do not contend that Mason advised them to lie about their past criminal records, but simply that they were unaware that the false statements were included in the applications. United States v. Johnson, supra, at 686-687.

ARGUMENT

The holding of the Eleventh Circuit took the point on appeal full circle. Hill's position was that his CPA, having full information prepared the forms which Hill signed without review. Hill was unaware of any incorrect statements because he relied on his CPA to have done his job correctly. The Eleventh Circuit, in true brain teaser fashion, held that Hill's defense was that he was "unaware", not that he relied on expert advice. By ignoring the fact that Hill was unaware <u>because</u> he relied on his CPA the Eleventh Circuit made the whole issue a chicken and egg search for a starting point.

The Eleventh Circuit explicitly found no "advice" was given. This is a curious holding. The Eleventh Circuit has adopted as precedent, cases of the

Fifth Circuit holding that a citizen can rely on what an expert says. Bursten v. United States, 395 F.2d 976, 981 (5th Cir. 1968) but has held, in the case before this Court, that a citizen cannot rely on what an expert does.

It is a strained interpretation of the word "advice" to conclude that an expert, having full information, makes no representation or "advice" when he presents a stack of voluminous papers to his client for signature. In the case before this court, the person who made the papers was a CPA and an expert in governmentally secured loans, and the defendant requested good faith reliance on expert. The underlying issue, however, is simply good faith reliance on another human being, whether expert or not. The Eleventh Circuit recognized good faith reliance on non-expert state-

ments as a defense in United States v. Lewis, 592 F.2d 1282 (5th Cir. 1979). In Lewis the defendant was charged with forgery. A person, not the payee of the check, told Lewis she had authority to cash it and asked Lewis to do it for her. He did, endorsing the check. Lewis asked for a good faith reliance instruction in the trial court which was denied. The Eleventh Circuit reversed, recognizing the good faith reliance defense under the facts. That decision was in accord with the realities of life. The decision before this court is not. Could not a businessman rely on his secretary to properly prepare a document for his signature. Could he not rely on his CPA? What monumental difference is there between relying on what an expert says and relying on what an expert does? The petitioner can find

no reported case on point, but logic suggests that reliance on expert performance is as reasonable as reliance on expert statements. The CPA exercises his expertise in making oral statements or in preparing a document. The law abiding citizen who takes all of his records to the CPA for preparation of a tax return must believe that the CPA has taken only proper deductions for him. If the citizen signs the return without reading it, he ought to be able to raise good faith--whether he had any conversation with the CPA or not. Failure to read what is signed is not fatal. The Seventh Circuit has specifically held that it can only be a permissive inference that a defendant knew the contents of a tax return he signed. United States v. Bass, 425 F.2d 161 (7th Cir. 1970).

The defendant's good faith in re-

lying on his CPA was his only defense. The defendant was entitled to an instruction that did not ignore his evidence. This court held in Bird v. United States, 21 S.Ct. 403, 405, 180 U.S. 356 45 Law.Ed. 570 (1901) that the very object of the charge of the judge is to "point out the essentials to be proved on the one side and the other..." (emphasis supplied) Id at 405, 358, 572. In Bird, the defense was self-defense, to which defendant had testified, but the trial judge had refused an instruction to the point. The case was reversed because ". . . the jury were left to pass upon the vital question without reference tc the defendant's evidence." Id. at 406, 358, 573. This court should grant the petition in the case before it for the same reason.

The Fifth Circuit, in cases adopted

by the recently created Eleventh Circuit as precedent, has recognized the right of the defendant to a specific instruction on his theory of defense, even if the evidence is weak, dubious or inconsistent United States v. Goss, 650 F.2d 1336 (5th Cir. 1981) The Eleventh Circuit itself has recognized the right of a defendant to an instruction specifically directed to his theory of defense. United States v. Lewis, supra.

In the case before this court the defendant received no instruction to support his theory of the case. The holdings of this court require an instruction. This court, in In Re Winship, 90 S.Ct. 1068, 397 U.S. 358 25 L.Ed.2d 368 (1970), explicitly held that due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Id at

1073, 364. And Bird requires the issues be fairly presented with sufficient instructions to apprise the jury of the law applicable to the defendant's evidence. Nevertheless, in the case before this Court there was nothing to indicate to the jury that what Hill was saying was legally important. The jury could have concluded that Hill was guilty simply because he signed the paper. In the absence of an instruction dignifying the defendant's evidence, the jury could well have reasoned that since Hill signed the paper and the paper was false, Hill was guilty of making a false statement.

Judge Vinson in Williams v. United States, 131 F.2d 21 (D.C. Cir. 1942) expressed a fundamental sentiment directly applicable to the case before this court:

> It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Id. at 23

CONCLUSION

The petitioner was entitled to a jury instruction on his theory of defense. The petitioner requested it; there was evidence to support it; but he didn't get it. This court should grant the petition and give the parties an opportunity to fully brief this case.

Respectfully submitted,

John D. O'Brien
Post Office Box 1218
Panama City, FL 32402
904/769-3493
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served including the Solicitor General, Department of Justice, Washington, D.C. 20530, by regular U. S. Mail with the foregoing Petition for a Writ of Certiorari, this 27th day of July, 1984.

John D. O'Brien
Post Office Box 1218
Panama City, FL 32402
(904) 769-3493

ATTORNEY FOR PETITIONER
IRA HILL, JR.

APPENDIX 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert Allen JOHNSON, Roy Maxwell
Lister and Ira Hill, Jr.
Defendants-Appellants.

No. 82-3205

United States Court of Appeals
Eleventh Circuit

April 23, 1984

OPINION

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The appellants, Ira Hill, Jr., Roy Lister and Robert Johnson, were indicted on one count of conspiracy to submit false statements to a federal agency and eleven counts of submitting false state-

ments and documents to federal agencies in violation of 18 U.S.C. §1001. A jury found all three appellants guilty of conspiracy. Additionally, Hill was convicted of eight of the eleven counts of submitting false statements and documents, Johnson of five, and Lister of four.

The convictions arose out of Hill's attempt to sell various businesses by financing the sales through loans guaranteed by the Small Business Administration (SBA) and the Farmers Home Administration (FHA), both of which are federal agencies. The loan applications were first submitted to the Wewahitchka State Bank, were they were reviewed and recommended to the federal agencies by defendant Lister, then president of the bank and officer in charge of the loans. Defendant Johnson was the prospective

purchaser of one of the businesses, Florida Trailer Sales (FTS), and Pamela Wells, the woman he lived with, was the prospective buyer of another business, Eastgate Mobile Home Park. Hill also attempted to obtain a loan guarantee from the SBA for the sale of the Big Chief Truck Stop to another individual, Joe Dassinger.

The government contended at trial that the documents submitted to the SBA and FHA contained a number of false statements. These statements formed the basis for the various counts in the indictment:

(1) In the personal history form for Johnson submitted to the SBA to guarantee the purchase of FTS, it was represented that Johnson had never been arrested for, charged

with, or convicted of a criminal offense. Johnson had in fact been convicted of two prior felonies. All three defendants were convicted of this count (Count II)[1].

(2) A representation to the SBA that $50,000.00 deposit had been paid by Johnson towards the purchase of FTS, which the government contended had not actually been made (Count III). All three defendants were acquitted by the jury on this charge.

(3) A representation in the personal financial statement to the SBA that Johnson had assets exceeding his liabilities of $83,000 (Count

1. Count 1 charged the defendants with conspiracy to submit false statements, with the remaining counts alleged as the overt acts taken to effectuate the conspiracy.

(Count IV). The jury found only Johnson guilty of this charge.

(4) A representation to the SBA that Johnson had made an additional $10,000.00 down payment toward the purchase of FTS, which the government contended had not been made (Count V). Johnson and Hill were found guilty; Lister's motion for a directed verdict was granted.

(5) A statement in Hill's personal history form for the purchase of FTS that he had never been arrested for, charged with, or convicted of a criminal offense, when he had in fact been previously convicted of two counts of tax evasion (Count VI). Hill and Lister were found guilty on this count; Johnson's motion for a directed verdict was granted.

(6) A letter from Lister to the SBA stating that Hill intended to purchase FTS from his father, when allegedly Hill already owned the business (Count VII). Lister and Hill were found guilty on this count; Johnson's motion for a directed verdict was granted.

(7) A representation to the SBA in Hill's financial statement for the purchase of FTS that Hill's net worth was $163,000.00, which the government alleged was untrue (Count VIII). Hill and Lister were found guilty; Johnson's motion for a directed verdict was granted.

(8) A representation to the FHA in a loan application for the purchase of Eastgate Mobile Home Park that Hill's net worth was 3.3 million

dollars, which the government alleged was untrue (Count IX). Hill was found guilty and Lister was acquitted; Johnson's motion for a directed verdict was granted.

(9) A representation to the FHA that Pamela Wells had made a $5,000.00 down payment towards the purchase of Eastgate, and would make an additional down payment of $35,000.00 at closing, which representations the government alleged were untrue (Count X). Hill and Johnson were found guilty and Lister was acquitted.

(10) A statement to the FHA that Wells' assets exceeded her liabilities by $126,800.00, which the government alleged was untrue (Count XI). Johnson was found guilty and Hill was acquitted; Lister's motion

for a directed verdict was granted.

(11) A representation to the SBA that Joe Dassinger had made a $10,000.00 down payment toward the purchase of the Big Chief Truck Stop, which the government contended was untrue (Count XII). Hill was found guilty; Johnson and Lister's motions for directed verdicts were granted.

The government attempted to prove the allegations mainly through the testimony of Nick Mason, Hill's Certified Public Accountant. Mason testified at length how he, Hill and Johnson had knowingly falsified information in an attempt to secure the loan guarantees for the various sales. Mason also testified about two transactions, unrelated to the charges, in which Hill,

Lister and Johnson allegedly had engaged in similar fraudulent schemes.

The government called several other witnesses. FBI Special Agent Gene Halley related how Johnson had confessed that he, Hill, Mason and Lister had embarked upon a scheme to fraudulently obtain government loan guarantees. Pamela Wells, the prospective purchaser of the Eastgate Mobile Home Park, testified that the financial information she had provided was false and that the falsified information was submitted with the knowledge of Hill and Mason.

All three defendants took the stand. Both Johnson and Hill readily admitted that they had prior convictions, but contended that they had relied on Mason to fill out the SBA and FHA applications and were unaware that Mason had falsified the applications in

this respect. They also testified that their statements of financial worth and the disputed down payments were basically accurate and that any false statements were made without their knowledge. Lister's main defense was that he had failed to review the applications and thus was unaware of the false statements in the applications. He also denied knowledge of the allegedly nonexistent down payments.

I. The Expert Advice Instruction

The appellants first contend that the trial court erred in denying their request for an instruction on the defense of good faith reliance on an expert. They argue that they were entitled to such an instruction because their main defense at trial was that they had relied on their CPA, Nick

Mason, as an expert in filling out SBA and FHA applications for loan guarantees. The trial court refused to give the instruction because it found that the defense was inapplicable to the facts of the case. We agree.

[1] The defense of good faith reliance on expert advice is "designed to refute the government's proof that the defendant intended to commit the offense". United States v. Miller, 658 F.2d 235, 237 (4th Cir. 1981). To succeed, the defendant must show that (1) he fully disclosed all relevant facts to the expert and (2) that he relied in good faith on the expert's advice. United States v. Smith, 523 F.2d 771 (5th Cir. 1975), cert.. denied, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976).[2]

2. The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981),

[2] The flaw in the defendants' argument is that no expert advice was given to the defendants on which they relied. The charges against Hill, Johnson and Lister are not of the type where reliance on expert advice is relevant:

> (1) Hill and Johnson do not contend that Mason advised them to lie about their past criminal records,[3] but simply that they were unaware that the false statements were included in the applications.

adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

3. Indeed, if they had claimed that they relied on Mason's advice in lying about their criminal records, such a claim would clearly be outside of the "good faith" prong of the expert advice defense.

(2) The appellants also do not argue that they relied on Mason in calculating either theirs or Pamela Wells' financial assets, but instead claim that the statements were in fact substantially accurate and they did not know of any inaccuracies.

(3) Likewise, they do not claim that Mason advised them to falsely claim that down payments had been made, but rather that the down payments had either been made or that they did not knowingly claim that nonexistent down payments had been made.

(4) Finally, although Hill testified at trial that Mason advised him to transfer the stock of I & E Corporation to his father, the issue at trial was not whether such a transaction was legal (to which

the defense would arguably apply), but whether the transfer of stock ever took place, which reliance on expert advice was not relevant.

The appellants' defenses at trial, therefore, are properly characterized as claims that they did not willfully and knowingly make false statements, [4] and not as contentions that they relied on expert advice in making such statements.

The district court was not required to "grant a request that [did] not concern issues properly before the jury . . ." United States v. Goss, 650 F.2d 1336, 1344 (5th Cir. Unit A 1981). The court did not err, therefore, in denying the appellants' request for an

4. The appellants do not argue that the district court erred in its instructions on what constitutes "wilfully" and "knowingly".

instruction on the expert advice defense.

II. The Currative Instruction for Defendant Hill's Outburst

[3] During Mason's testimony, Hill stated in a loud voice, "He is lying." The court dismissed the jury and informed the defense counsel that he intended to give a curative instruction to the effect,

> Any comments you may have heard in the courtroom from people not under oath should be disregarded by you and play no part in your decision.

Defense counse made no objection to the proposed instruction, and the court proceeded to give substantially the same instruction to the jury:

> Ladies and gentlemen of the jury, immediately prior to the break there was some statement made by some individuals in the courtroom who were not at that time testifying under oath. I would advise you that any comments you may have heard in

> this courtroom from people who are not under oath, should be disregarded by you and play no part in the consideration of your verdict. Do you understand that? Do you have any problems with that? All right.

Again, none of the defendants objected.

Johnson and Lister now argue that the instruction's references to "some individuals" and to "people" prejudicially implied that they were responsible for Hill's outburst. The argument is frivolous. The judge's proposed instruction referred to "people," but the defendants did not object; nor did they object when the charge was given to the jury. Without an objection, the instruction must have constituted "plain error" for us to consider it. United States v. Smith, 700 F.2d 627 (11th Cir. 1983). The alleged error here, however, was not "both obvious and substantial" and thus does not warrant our considera-

tion. See id.

III. Limiting the Number of Character Witnesses

Appellant Johnson next argues that the district court erred in limiting the number of character witnesses that the defense could call to testify as to Mason's truthfulness.[5] Hill's counsel had called three witnesses who testified to their lack of trust in Mason, after which the government made a motion to

5. Hill adopts Johnson's argument. Lister also purports to adopt Johnson's argument, but states that his objection is to the limitation of cross-examination of Mason and Pat Lister. He points to no prejudicial error in those instances where the trial court limited questioning of Mason and we find that sufficient cross-examination was allowed such that the court did not abuse its discretion. Greene v. Wainwright. 634 F.2d 272, 275 (5th Cir. 1981). The limitation on the questioning of Pat Lister came during direct, not cross-examination, and thus at most is an argument that the court improperly limited character evidence, see infra note 5.

prevent further character evidence against Mason. Hill's counsel indicated that he had no additional character witnesses, and the court noted, "that took care of itself".

The government argues, based on the above exchange, that the trial court never actually ruled on the government's motion to limit character evidence. When a later witness was on the stand, however, Hill's counsel stated, "Your Honor, again, I would proffer the testimony of this witness in regards to the truthfulness of Nick Mason." The government objected and the trial court ruled that the testimony would be cumulative.[6] We find, therefore, that the

6. Johnson also points to the direct examination of Pat Lister where she was asked "Has [Mason] on occasion lied to you," and the government's general objection was sustained. It is unclear as

trial court did limit the amount of character evidence against Mason.

[4, 5] The decision to limit the number of character witnesses and the amount of character evidence is within the trial court's discretion. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The appellants maintain that here the trial judge improperly limited the number of character witnesses to three, citing for support United States v. Gray, 507 F.2d 1013 (5th Cir. 1975). Gray, however, stands only for the proposition that a trial judge should not use an "unvarying rule" as to the number of character

to whether the government was objecting on hearsay grounds or because her reply would be character evidence. Because we find that the court did limit the defense's introduction of character evidence, we need not decipher the basis of the court's ruling.

witnesses allowed without regard for the circumstances of the case, because such a "rule" would be arbitrary and not an exercise of discretion. Gray is inapplicable to the case at hand, as the judge did not rely on an "unvarying rule" but determined that any further character evidence would be "cumulative". Nor do we find after reviewing the record that the district court abused its discretion in limiting the number of character witnesses or the amount of character evidence against Mason. We agree with the district court that the three character witnesses called by the defense were given ample opportunity to express their distrust of Mason, and that any further testimony would not have significantly aided the jury in assessing Mason's credibility.

IV. Sufficiency of the Evidence

[6] Both Johnson and Lister challenge the sufficiency of the evidence for their convictions. Such challenges are governed by the standard outlined in United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B)(en banc), aff'd on other grounds, ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

In making this assessment, an appellate court must view the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60,

62 S.Ct. 457, 86 L.Ed. 680 (1942), and accept reasonable inferences and credibility choices by the factfinder, United States v. Gonzalez, 719 F.2d 1516, 1521-22 (11th Cir. 1983).

A. Johnson's Convictions

[7] Applying the Bell standard in viewing the evidence in the light most favorable to the government, Glasser, supra, there is ample evidence to support Johnson's convictions for conspiracy and his other convictions arising out of the FTS and Eastgate loan guarantee applications.

First, we find there is sufficient evidence to support Johnson's conviction for conspiracy to submit false statements to a federal agency. Mason, whose credibiliy was an issue for the jury, directly testified to a number of occasions where he, Hill and Johnson

together discussed how to fraudulently obtain federal loan guarantees. Moreover when asked by the FBI "if he could testify to the fact that Hill, Lister and Mason conspired together and brought the forms to him to sign in regard to the SBA loan and that Johnson knew these loans to be false," Johnson replied "that's the truth of the matter". As the discussion below of Johnson's conviction for false statements also makes evident, a reasonable jury would have had no trouble concluding beyond a reasonable doubt that overt acts were done in furtherance of the conspiracy.

Mason testified directly to Johnson's knowledge of the false statements in the FTS application. He stated that Johnson knew the personal history forms claimed that Johnson had

no prior convictions and that he, Johnson and Hill had laughed about the form as they filled it out. Likewise, Mason testified that Johnson knew that the financial statement claiming Johnson had a net worth of $83,000 was false and that he and Johnson had together come up with the figure "out of the air." The government also introduced documentary evidence from which a jury could have reasonably found that Johnson's supposed $10,000 down payment on FTS was a sham; the evidence showed that Johnson and Hill had exchanged checks on the same day for $10,000 the net result being that no down payment was actually made.

Sufficient evidence was also introduced to support Johnson's convictions arising out of the Eastgate application. Johnson admitted that he had negotiated Pamela Wells' alleged $40,000 down

payment, and Mason testified that Johnson knew there was never any intention that the down payment would actually be paid. Both Mason and Wells also testified that Wells' financial statement for the loan guarantee on Eastgate was false and that Johnson was extensively involved in the arrangements for Eastgate's purchase. From this evidence, a reasonable jury could conclude beyond a reasonable doubt that Johnson participated in the misrepresentation of Wells' financial worth.

B. Lister's Convictions

We also find sufficient evidence to support Lister's conviction for conspiracy. Mason expressly stated at trial that he had discussed with Lister the inclusion of false statements in the loan guarantee applications. Johnson in

his statement to the FBI replied affirmatively when asked whether a conspiracy involving Hill, Lister and Mason existed. In addition to this direct evidence of Lister's involvement, there is substantial circumstantial evidence of Lister's participation in the conspiracy: he was the officer who processed the applications and submitted them to the SBA and FHA, and, although he claimed he did not know the false statements were in the forms, he admitted he knew Johnson and Hill had prior convictions;[7] he signed the letter to the SBA stating Hill intended to buy FTS from his father, even though, as the government's evidence convincingly showed, he knew that Hill owned FTS;

7. Lister's defense, that he was unaware that the false statements were in the applications, was of course an issue for the jury.

and, as Mason testified, Lister was the individual who advised Mason on how much collateral they would need to claim to qualify for the loan guarantees. Based on the above direct and circumstantial evidence, a reasonably cautious jury could have found beyond a reasonable doubt that Lister was part of the conspiracy.

[8] The government's evidence against Lister as to the substantive counts was not as strong as that against Hill and Johnson. We need not, however, find independent evidence of Lister's direct participation in each substantive count of which he was convicted, because "[a] conspirator can be found guilty of a substantive offense based upon acts of a coconspirator done in furtherance of the conspiracy, unless the act 'did not fall within the scope of the unlawful

project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979), cert. denied, 441 U.S. 936, 947, 99 S.Ct. 2061, 2168, 60 L.Ed.2d 666 (quoting Pinkerton v. United States, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 1184-85, 90 L.Ed. 1489 (1946). As the district court properly instructed the jury, to find Lister guilty there only needed to exist sufficient evidence for the jury to conclude that other coconspirators committed the acts with which he was charged and that such acts were a forseeable part of the conspiracy.[8]

8. The Moreno court did note that the doctrine of vicarious guilt may have due process limitations. 588 F.2d at

Such a finding is supported by the record. Among other evidence, Mason directly testified to Hill's and Johnson's participation in those counts of which Lister was also found guilty. Moreover, the acts were aimed at the accomplishment of the conspiracy's goal, obtaining federal loan guarantees, and thus were clearly foreseeable. The jury, therefore, could have reasonably found Lister guilty of the substantive counts.

V. Extrinsic Acts Evidence

[9] On redirect, Mason testified to a real estate transaction in which Lister, Johnson and Hill allegedly used false financial statements to obtain and sell a fictitious second mortgage on

493. As in Moreno, however, attributing the acts of Hill and Johnson to Lister is not so attenuated that such due process concerns would apply here.

some property. The judge initially had ruled that such testimony was inadmissible. On redirect, however, the judge allowed Mason to testify about the transaction because defense counsel during cross-examination had asked Mason about Lister's involvement in L & H Properties, a partnership between Lister and Hill and one of the companies involved in the fictitious mortgage scheme. The judge ruled, therefore, that defense counsel had "opened the door" and Mason would be allowed to testify as to Lister's involvement in L & H. After Mason's testimony, defense counsel moved for an instruction on use of "similar acts" evidence under Federal Rule of Evidence 404(b). The government contends that the evidence was properly admitted because it was used as a response to defense counsel's implica-

tion on cross-examination that Lister was not involved with L & H Properties. Because we find that the testimony was properly admitted as rebuttal evidence and did not violate F.R.Evid. 403, we need not address the defendant's argument based on F.R. Evid. 404(b).

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We must determine, therefore, whether the testimony was relevant and, if so, whether its probative value outweighed its prejudicial effect.

On cross-examination, Lister's counsel had the following exchange with Mason:

Q. Isn't it true that you know of or had knowledge that Roy Lister and Buddy [Hill] never really put that corporation in effect as being together, in other words, Lister and Hill [L & H]?

A. It's my understanding it was a dummy corporation, dummy corporation.

. . . . . .

Q. It was not put into--was not used by Mr. Lister, as far as you know, ever put into effect by him or Mr. Lister?

A. No, sir. That is not correct.

Q. I am saying it was not put into effect by Mr. Lister. Maybe you misunderstood my question.

A. They used that corporation in another deal on the Transmitter Road property, on Trailer City Estate.

Q. You're stating Mr. Lister was involving in that?

A. Yes, sir, he was.

Q. All right. As a stockholder or officer of the corporation.

A. He was involved in obtaining a second mortgage on--

Q. I'm not asking about that. I'm asking you if he was involved as a stockholder or an officer?

A. I don't know that.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Lister's familiarity and involvement with Hill's business affairs was a fact of consequence to the government's case, especially for the count alleging that Lister knew that Hill's statement that he was buying FTS from his father was false. The extent of Lister's involvement with L & H, therefore, was a signi-

ficant fact, and Lister's role in the fictitious mortgage scheme was probative to his involvement in the partnership and his knowledge of Hill's business affairs. The probity of the mortgage scheme was further enhanced once defense counsel attempted to establish on cross-examination that Lister never actively participated in L & H.

Against the evidence's probative value, we must weigh the danger of prejudice. Here, the danger presented was that the jury would convict Lister based on the fictitious mortgage scheme involving L & H rather than on the evidence introduced for the charged offense.[9] Cf. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en

9. The danger that the defendant would be convicted based on the extrinsic

banc). Although the district court may have been correct in initially determining that the prejudicial effect of the mortgage scheme outweighed its probative value, the court properly ruled that once defense counsel "opened the door" on cross-examination, by implying that Lister never really participated in L & H, the scheme's probative value was enhanced such that it outweighed its prejudicial effect. On redirect, therefore, the government was entitled to elicit rebuttal testimony from Mason as to whether Lister and Hill had in fact used L & H for business, and Mason's

offense and not the charged offense is the same danger presented by similar acts evidence under Rule 404(b). Our analysis differs here from that for Rule 404(b) because we consider the evidence's relevancy in terms of rebuttal on redirect and not for the purposes outlined in Rule 404(b), such as showing motive, opportunity or intent.

testimony about the mortgage scheme served that purpose. Moreoever, the judge gave the jury cautionary instructions on the use of similar acts evidence both immediately after the testimony and during its closing charge, thus further minimizing the danger of prejudice.[10] Cf. Beechum, 582 F.2d at 917. We conclude that the judge did not abuse its discretion in admitting the testimony as rebuttal evidence to show Lister's involvement with L & H Properties.

VI. Conclusion

Having found sufficient evidence to support appellants' convictions and having found no prejudicial error at trial, the convictions are AFFIRMED.

10. Although the cautionary instruction is generally used for Rule 404(b)

extrinsic acts evidence, we find that it served a similar purpose here in minimizing the prejudicial nature of the rebuttal evidence.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-3205

UNITED STATES OF AMERICA,

Petitioner-Appellee,

versus

ROBERT ALLEN JOHNSON,
ROY MAXWELL LISTER and
IRA HILL, JR.,

Defendants-Appellants.

- - - - - - - - -

Appeals from the United States District Court for the Northern District of Florida

- - - - - - - - -

ON PETITIONS FOR REHEARING

( )

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the

same are hereby denied.

ENTERED FOR THE COURT:

s/Phyllis Kravitch

United States Circuit Judge

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 30, 1984
SPENCER D. MERCER
CLERK

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs CASE NO. MCR 82-00208

IRA HILL, JR., ROY MAXWELL LISTER, and ROBERT ALLEN JOHNSON,

Defendants.

O R D E R

Before this Court are the post-trial motions filed by the defendants. Defendant Hill has filed a Motion for Judgment of Acquittal and Motion for New Trial (Doc 80). Defendant Lister has also filed a Motion for Judgment of Acquittal and Motion for New Trial (Doc 81). The grounds asserted by the two defendants are similar, and Lister has adopted the memorandum of law filed by

Hill in support of his motion. Defendant Johnson has filed only a Motion for New Trial (Doc 84). The motions of all of the defendants are hereby DENIED.

The defendants raise one point in their motions which merits further discussion. All three defendants assert that it was error for the Court to refuse to instruct the jury on the defense of good faith reliance on an expert. The Court is aware that it has a duty to "charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent". United States v. Lewis, 592 F.2d 1282, 1285 (5th Cir. 1979); United States v. Conroy, 589 F.2d 1258, 1273 (5th cir. 1979); Perez v. United States, 297 F.2d 12 (5th Cir. 1961). However,

in this case there was no foundation in the evidence which warranted the instruction requested by the defendants. It is the opinion of this Court that the defense of good faith reliance on expert advice was not available to the defendants on the facts in this case. As noted in United States v. Miller, 658 F.2d 235, 237 (4th Cir. 1981), the reliance defense is "urged most frequently in tax evasion cases, [and] is designed to refute the government's proof that the defendant intended to commit the offense". See United States v. Smith, 523 F.2d 771 (5th Cir. 1975) cert. denied 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976). In order to be entitled to the instruction on good faith reliance on an expert there must be some evidence of (1) full disclosure of all pertinent facts to an expert, and (2)

good faith reliance on the expert's advice. See United States v. Smith, supra; Bursten v. United States, 395 F.2d 976 (5th Cir. 1968). In this case, there was no evidence to support either of those elements. As the Fifth Circuit noted in United States v. Smith, supra, at 778, "[t]he reliance defense serves the purpose of negating intent to commit an offense. It will not avail as a means of shifting criminal responsibility". The defendant's requested a reliance instruction as a theory of their defense. However, "denominating a proposed instruction a theory of defense does not automatically require that it be given. It is not necessary to grant a request that does not concern issues properly before the jury or would tend to confuse them". United States v.

Goss, 650 F.2d 1336, 1344 (5th Cir. 1981); United States v. Malatesta, 583 F.2d 748, 759 (5th cir. 1978), modified on rehearing en banc, 590 F.2d 1379 (5th Cir. 1979), cert. denied sub nom., 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed2d 777 and 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). To have granted the defendant's requested instruction when there was no foundation for it in the evidence would have only tended to confuse the jury. Therefore, it was within this Court's discretion to refuse to give the requested instruction. United States v. Gaines, No. 81-7174, slip op. at 360 (11th Cir. November 1, 1982); United States v. Goss, supra; United States v. Castro, 596 F.2d 674 (5th Cir.),

DONE AND ORDERED in chambers at

Tallahassee, Florida this 6th day of December, 1982.

s/Maurice M. Paul

United States District Judge

APPENDIX 4

JURY INSTRUCTIONS
Transcript Volume 17, pages 104-128

[THE COURT]: Ladies and gentlemen of the jury, you have now heard all the evidence in case as well as the final arguments of the lawyers representing the various parties. It now becomes my duty to instruct you on the rules of law that you must follow and apply in arriving at your decision in this case.

In any jury trial there are in effect two judges. I am one of those judges, the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for you to consider.

It is also my duty at the end of the trial to instruct you on the law which is applicable to the case under

consideration.

On the other hand, you as jurors are the judges of the facts. But in determining what actually happened in this case, that is in reaching your decision as to the facts, it is your sworn duty to follow the law I am now in the process of defining for you.

Unless otherwise stated, you should consider each instruction to apply separately and individually to each of the defendants on trial. And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule I may state to you.

That is you must not substitute or follow your own motion or opinion as to what the law is or ought to be.

It is your duty to apply the law as

I now give it to you, regardless of the consequences.

But, by the same token, it is also your duty to base your verdict solely upon the testimony and the evidence in this case without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case and they have the right to expect nothing less from you.

As I have told you before, the indictment or the formal charge against a defendant is not evidence of guilt. Indeed the defendant or defendants are presumed by law to be innocent. The law does not require the defendant to prove his innocence or to produce any evidence at all. And no inference whatever may be drawn from the election of a defen-

dant not the [sic] testify.

The government has the burden of proving him guilty beyond a reasonable doubt and if it fails to do so then you must acquit him. While the government's burden of proof is a strict or a heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.

Now a reasonable doubt is a real doubt. Based upon reason and common sense after a careful and impartial consideration of all of the evidence which has been presented in this case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation

in the most important of your own affairs.

If you are convinced that the accused has been proved guilty beyond reasonable doubt, you should say so. If you're not so convinced you should say so.

As I stated earlier, it is your duty to determine the facts and in so doing you must consider only the evidence that has been admitted during the course of this trial. The term evidence includes the sworn testimony of witnesses on the stand, and the exhibits which have been admitted in the record.

You should remember that any statements, objections or arguments made by the lawyers are not evidence in this case. The function of the lawyers is to point out those things that are most

significant or most helpful to their side of the case. And in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

But in the final analysis, however, it is your own recollection and interpretation of the evidence that controls in this case. But what the lawyers say is not binding upon you.

Also, during the course of the trial, I occasionally may have made a comment to the lawyers or admonish a witness concerning the manner in which he should respond to the questions of counsel. You should not assume from anything that I may have said that I have any opinion concerning any of the issues of this case.

Except for my instruction to you on the law you should disregard anything I

may have said during the trial in arriving at your own findings as to the facts.

So while you should consider only the evidence in the case, you're also permitted to draw such reasonable inferences from the testimony and exhibits as are justified in the light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and the evidence presented.

You may also consider either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evi-

dence is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence.

It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I've told you that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. For you are the sole judges of the credibility or the believability of each witness and the weight to be given to his or her testimony.

In weighing the testimony of a witness you should consider his or her relationship to the government or to the

defendant, his interest if any in the outcome of the case, his manner or [sic] testifying, his opportunity to observe or acquire knowledge concerning the facts about which he testified, his candor, fairness, and intelligence and the extent to which he has been supported or contradicted by other credible evidence. You may in short accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence, by showing that he testified falsely concerning a material fact or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witnesses present testimony.

A witness may be discredited or impeached by other witnesses and that he may or may not be believed. If you believe that any witness has been so impeached then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Now, a defendant has a right not to testify. But if a defendant does testify his testimony should be weighed and considered and his credibility deter-

mined in the same way as that of any other witness. The evidence of a defendants previous conviction of a crime is to be considered by you only insofar as it may affect the credibility of the defendant as a witness and it must never been [sic] considered as evidence of guilt of the crime for which the defendant is on trial.

The testimony of an alleged accomplice and the testimony of one who provides evidence against a defendant as an informant for pay or for immunity from punishment, or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses.

You, the jury, must decide whether the witness's testimony has been af-

fected by any of those circumstances or by his interest in the outcome of the case or by prejudice against the defendant or by the benefit that he has received either financially or as a result of being immunized from prosecution.

If you determine that the testimony of such a witness was affected by one or more of those factors you should keep in mind that such testimony is always to be received with caution and weighed with great care.

This is also true of a witness who has entered into a plea agreement with the government. You should never convict any defendant on the unsupported testimony of such a witness, unless you believe that testimony beyond a reasonable doubt.

Summary evidence, both testimony and written has been admitted into evi-

dence. The original materials upon which the summaries are based have also been admitted into evidence so that you may determine whether the summary evidence is accurate.

Summaries are used as a matter of convince [sic]. You should, however, rely upon your observations and interpretation of the documents and ignore the summaries if you find them inaccurate.

The Rules of Evidence provide that if scientific, technical or other specialized knowledge might assist a jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

In determining whether any statement claimed to have been made by a defendant ouside of court and if an alleged crime has been committed, was knowingly and voluntarily made, the jury should consider the evidence concerning such a statement with caution and great care and should give such weight to the statement as the jury feels it deserves under all of the circumstances.

The jury may consider in that regard such factors as the age, sex, training, education, occupation and physical and mental condition of the defendant, his treatment while under interrogation, and all other circumstances in evidence surrounding the making of the statement. Of course, any such statement should not be considered in any way whatever as evidence with respect to any other defendant on trial.

Now, Counts 2 through 12 charge various defendants with violating Title 18, United States Code, Section 1001, which prohibits knowingly and willfully making or using any false or fictitious statements or representations in any manner within the jurisdiction of any department or agency of the United States.

Now, you will be given a copy of the indictment to use during your deliberations and you should refer to it for the specific allegation or specific action alleged to be a violation of that law.

I will now define the offense for you in Counts 2 through 12.

Title 18, United States Code, Section 1001, provides in part as follows.

Whoever, in any matter, within the jurisdiction of any department or agency of the United States, knowingly and willfully makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or documents, knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be guilty of an offense against the United States.

Now there are three essential elements which must be proved beyond a reasonable doubt in order to estabish the offense proscribed by this law.

First, that the defendant knowingly made a false statement or made or used a false document in relation to a matter within the jurisdiction of a department or agency of the United States as charged.

Second, that the false statement or false document related to a material matter.

And third, that the defendant acted willfully and with knowledge of the falsity.

Now, a statement or document is false when made or used if it is untrue and is then known to be untrue by the person making or using it.

It is not necessary to show, however, that the government agency was in fact deceived or mislead [sic]. The Small Business Administration and the Farmers Home Administration are both agencies of the United States. The filing of documents with those agencies to obtain a loan or a loan guarantee is a matter within the jurisdiction of those agencies.

The making of a false statement or use of a false document is not an offense unless the falsity relates to a material fact. The issue of materiality, however, is not submitted to you for your decision, but is a matter to be determined by the Court.

You're now instructed that the alleged facts charged in the indictments as having been falsified would be material facts.

Count 1 charges the defendants with conspiring to violate Title 18, United States Code, Section 1001. I have just instructed you on the definition and elements of the offense created by that law. I will now define conspiracy for you.

Section 371 of Title 18, United States Code, provides that if two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy each is guilty of an offense against the United States.

So under this law a conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose.

It is a kind of partnership in

criminal purposes in which each member becomes the agent of each other member.

The gist or the essence of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement. Or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished.

Similarly, the evidence in the case need not establish that all the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy or that all of the means or methods which were agreed upon were actually used or put into opera-

tion.

Neither must it be proved that all of the persons charged to have been members of the conspiracy were such nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Now what the evidence in the case must show beyond a reasonable doubt is that two or more persons in some way or manner positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment.

That the defendant willfully became a member of such conspiracy. That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods or overt acts described in the indictment

and that such overt act was kowingly committed at or about the time alleged in an effort to affect or accomplish some object or purpose of the conspiracy.

And [sic] overt act is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

One may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all of the other alleged conspirators.

So if a defendant with an understanding of the unlawful character of a plan knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspira-

cy, even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event or mere similarity of conduct amongst various persons and the fact that they may have associated with each other and may have assembled together and discussed common aims and interest does not necessarily establish proof of the existence of a conspiracy.

Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy does not there by become a conspirator.

You will note that the indictment charges that the offense was committed

on or about a certain date. The proof may not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, the word knowingly as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally, not because of mistake or accident.

The word willfully, as that term has been used from time to time in these instructions means that the act was committed voluntary [sic] and purposefully with the specific intent to do something the law forbids. That is to say with bad purpose either to disobey or disregard the law.

The guilt of an accused in a crimi-

nal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through the direction of another person as his agent or by acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Title 18 United States Code Section 2 provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by him or if the defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other person, just as though he had committed the acts or engaged in such conduct himself.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about. that is to say, that he willfully seek by some act or omission of his to make the criminal

venture succeed.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided or abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was comitted by some person or persons and that the defendant willfully participated in its commission.

If you find that a particular defendant is guilty of conspiracy, as

charged in Count 1 of the indictment, you may also find that defendant guilty of a substantive offense charged in any other count of the indictment, provided that you find that the essential elements of that count, as defined in these instructions, have been established beyond a reasonable doubt that one of the defendants committed the offense.

And provided that you also find beyond a reasonable doubt, first, that the offense defined in this substantive count was committed pursuant to and to further the conspiracy.

And second, that the particular defendant was a member of the conspiracy at the time the substantive offense was comitted.

And third, that the defendant should reasonably anticipate the substantive offense would be committed.

Under the conditions which I have just defined, a defendant may be found guilty of a substantive count even though he did not participate in the acts constituting the offense as defined in that count. The reason for this is that a coconspirator comitting a substantive offense pursuant to a conspiracy is held to be the agent of the other coconspirators.

Now, during the course of the trial, as you know from an instruction which I gave you at the time, the testimony or evidence was received with respect to the assignment of a certain mortgage to S.D.A. Company. This transaction would not constitute any federal offense as charged in the indictment in this case, but would at most constitute evidence of similar act in relation to

those alleged in the indictment.

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time or on other occasion. That is to say, evidence that a defendant may have committed an act similar to the acts alleged in the indictment may not be considered by the jury in determining whether the accused in fact committed any act charged in the indictment.

Nor may evidence of some other act of a like nature be considered for any purpose whatsoever. Unless the jury first finds that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment then under deliberation.

If the jury so finds beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under deliberation, then the jury may consider evidence as to an alleged act of a like nature in determining the state of mind or intent with which the accused did the act charged in the particular count of the indictment.

And where proof of an alleged act of a like nature is established by evidence which is clear and conclusive, the jury may, but is not obliged to draw an inference and find that in doing the act charged in the particular count under deliberation, the accused acted willfully, not because of mistake or accident or other innocent reason.

Now, a separate crime or offense is

charged against one or more of the defendants in each count of the indictment. Each offense and the evidence pertaining to it should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any one of the offenses charged should not control your verdict as to any other offense or as to any other defendant.

I caution you that you are here to determine the guilt or the innocence of the accused from the evidence presented in this cause. The defendant or defendants are not on trial for any act or any conduct or any offense not alleged in the indictment.

Neither are you called upon to return a verdict as to the guilt or

innocence of any other person or persons not on trial as a defendant in this case.

Also, the punishment provided by law for this offense charged in the indictment is a matter exclusively within the province of the court and shouldn't be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

In that connection, some of the documents in evidence contain a warning concerning making willful and false statements and cites Section 16A of the Small Business Act and cites the penalty therefore. The defendants in this case are not charged with a violation of that particular law. Accordingly, you should disregard and not make a part of your

deliberation 16A of the Small Business Act and the punishment cited there in [sic].

Now where a defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity or as a law abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character with respect to those traits would commit such a crime.

The jury will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or the duty of calling any witness

or producing any evidence.

Now, whatever your verdict, it must represent the considered judgment of each juror. In order to return a verdict in this case it is necessary that each juror agree to that verdict. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one other [sic] and to deliberate in an effort to reach agreement, if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but only after an impartial consideration of evidence in this case with your fellow jurors.

In the course of your deliberations, you should not hesitate to reexamine your own views and change your

opinion if convinced it is erroneous.

But you should not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You should remember at all times that you are not partisans, you are the judges, that is the judges of the fact. Your sole interest in this case is to seek the truth from the evidence which has been presented.

Now, upon retiring to the jury room you should first select one of your number to act as your foreman or forewomen [sic] who will preside over your deliberations and will be your spokesman here in court.

Forms of verdict have been prepared for your convenience. I will briefly explain them to you now.

There has been a separate verdict form prepared for each of the defendants. Each verdict form sets forth the counts of the indictment which are applicable to that particular defendant. Each verdict form contains a statement as to each count applicable to that defendant. The verdict forms, without reading all three of them in toto to you, are set up in the following manner.

Like Count 1. The verdict form on Count 1, which is applicable to all defendants. It says, we the jury find the defendant -- then it will name that defendant, not guilty or guilty, so say we all and a place for the date and the signature line for one of your number as foreman or forewomen [sic].

Going through the counts applicable to that defendant, you should for each

count insert whatever the verdict of the jury is, not guilty or guilty. Return that for each defendant as to each count applicable to that particular defendant.

As I have indicated, you may take these verdict forms with you into the jury room. When you have reached a unanimous agreement as to your verdict on each count as to that defendant your foreman should fill in the verdict for the jury, date the form and once you have completed your entire deliberation return the verdict forms with you when you are ready to return to the courtroom.

If during the course of your deliberations you find it necessary to communicate with the court, any such communication or message should be in writing and signed by the foreman or the forewoman and you should past [sic] the

note to the marshall who will be outside of your door and he will bring to it [sic] my attention. I would then confer with the attorneys involved and make an appropriate response to that inquiry, either in writing or by having you return to the courtroom so that I might address you oraly [sic].

I should caution you, however, that with regard to any message or question that you might send, you should never state or specify your numerical division at that time in whatever question or statement you may make.

Now, Mr. Carlin, you have been our alternate juror in this case, whether you knew it or not. And [sic] alternate juror is sort of like the back up quarterback. You practice, attend all the games, learn all the plays, but doesn't

[sic] get into the game unless the first string quarterback gets injured.

Well, luckily none of these jurors have had any reason to be excused from this particular case and it would be improper for you to continue with this jury when they go back to deliberate. I will ask that when the other members of the jury, in just a minute retire to the jury room, that you, sir, please just keep your seat.

Ladies and gentlemen of the jury, you will be permitted to take with you into the jury room all tangible pieces of evidence or documents which have been received during the course of this trial. You also will be permitted to take with you into the jury room the written instructions which I have just read to you.

I caution you about what I have

already told you orally, that you should not single out any one instruction and give it precedents over any other instruction, that you should consider them as a group and together, because that's how they're given to you.

You also are going to be permitted to take with you into the jury room the indictments or a copy of the indictment. I caution you again, the indictment is not evidence and is merely being sent to the jury room as an aid to assist you in making orderly disposition of the case and in returning whatever your verdicts may be.

Since there are three defendants and there are multiple counts I feel that that will assist you.

I caution you again, that although these defendants have been tried to-

gether they are to be given the consid-
eration by you as if they had been tried
separately and give them each that care
and attention.